No. 99-24

FILED
SEP 29 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1999

ORANGE COUNTY DEPARTMENT OF PROBATION,

Petitioner,

v.

ROBERT WARNER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE REPORTER COMPANY, *Printers and Publishers, Inc.*
181 Delaware Street, Walton, NY 13856—800-252-7181
(1911 – 1999)

Printed on Recycled Paper

QUESTIONS PRESENTED

1. Do the Twelve Steps of Alcoholics Anonymous constitute religious doctrine and practice within the meaning of the Establishment Clause of the First Amendment?

2. Does government coerced attendance at Alcoholics Anonymous meetings violate the Establishment Clause of the First Amendment?

3. Was it reasonably foreseeable that the sentencing judge would adopt Orange County Probation Department's recommendation that Warner be required to attend Alcoholics Anonymous meetings?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Summary of the Argument

Respondent Robert Warner ("Warner") brought this suit under 42 U.S.C. 1983 to obtain declaratory and compensatory relief on his claim that petitioner Orange County Department of Probation ("Probation Department") coerced him into attending Alcoholics Anonymous ("A.A.") meetings in violation of the Establishment Clause of the First Amendment to the United States Constitution. By Opinion dated December 19, 1994, the District Court for the Southern District of New York (Hon. Gerard L. Goettel) found that the idea of requiring Warner to attend A.A. originated with the Probation Department, that "the A.A. program that Warner experienced placed a heavy emphasis on spirituality and prayer, in both conception and practice," (91a) that Warner was "unquestionably coerced" (93a) to attend A.A. meetings that were "the functional equivalent of religious exercise" (93a) and that such coercion "tends to establish a state religious faith" in violation of the Establishment Clause. (94a)

The Court of Appeals below agreed with the District Court, stating that "[t]he A.A program to which Warner was exposed had a substantial religious component" and that it had "no doubt that the [A.A.] meetings Warner attended were intensely religious events." The Court of Appeals also had "no doubt . . . that Warner was coerced into participating in these religious exercises by virtue of his probation sentence," since if he failed to attend A.A., he "would have been subject to imprisonment for violation of probation." (36a-37a)

The Court of Appeals upheld the District Court's finding that the Probation Department's "recommendation that Warner be required to participate in A.A. therapy was unquestionably made pursuant to a general policy,"(27a-28a) and found citing *Malley v. Briggs*, 475 U.S. 335, 334 n. 7 (1986) that the A.A. conditions in Warner's sentence was a "natural consequence" of that general policy.

Statement of Facts

I. The Policy of the Probation Department

On November 13, 1990, before the Justice Court of the Town of Woodbury, County of Orange, State of New York, Warner pled guilty to the charges of aggravated unlicensed operation of a motor vehicle in the second degree [N.Y.S. Veh. Traf. Law Sec. 511(2)] and driving while ability impaired [N.Y.S. Veh. Traf. Law, Sec. 1192(1)]. The Justice Court thereupon ordered the Probation Department to prepare Warner's pre-sentence investigation report. When the Probation Department presented its report to the Justice Court, it included a pre-printed form, drafted by the Probation Department, entitled "Standard Conditions of Probation"[1] This form was used by the Probation Department county-wide and was included in every pre-sentence investigation report where the defendant to be sentenced might receive a period of probation.

Attached to the "Standard Conditions" form in Warner's pre-sentence report was another pre-printed form, also drafted by the Probation Department, entitled "Additional Conditions of Probation Pertaining to Alcohol." This form stated in pertinent part: "Your

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[1] Warner's Exhibit "2" provides in pertinent part the following:

In accordance with Section 65 of the Penal Law, you have been sentenced by the Court to a (3) three-year period of Probation. While on Probation, you are in the legal custody of the COURT. If your community adjustment is favorable, you can be discharged from probation before the maximum expiration date, if so ordered by the COURT.

While on probation, you shall faithfully observe the conditions of your probation. You realize that a violation of these conditions or any others imposed by the COURT may result in your being returned to the COURT for further action, which may result in your possible confinement.

Your conditions of probation are:

* * *

Other special conditions:

Special Alcohol Conditions (as per attached)

* * *

probation is subject to the following additional conditions * * * That you will attend Alcoholics Anonymous at the direction of your probation officer." This directive was included in the Probation Department's pre-sentence report whenever it may be relevant to the prospective probationer.

The Probation Department did not consult with the sentencing judges in Orange County when it introduced its "Additional Conditions of Probation Pertaining to Alcohol". But when the Probation Department drafted this form, it was aware of the fact that Alcoholics Anonymous utilized the "Twelve Steps of Alcoholics Anonymous" (See Appendix A. at pps. 1a - 2a).

Prior to and throughout the time that Warner was on probation, it had been the Probation Department's policy to use the Twelve Steps to monitor probationers who were subject to the additional alcohol conditions as to whether they were gaining any insight in terms of themselves and their use of alcohol.

From as early as December 13, 1990, Warner's probation officer, Neal Terwilliger, directed Warner to attend three A. A. meetings per week. Throughout the period that Terwilliger was Warner's probation officer he required Warner to turn in an "A.A. Monitoring Sheet", the purpose of which was to verify that Warner, as with all probationer's similarly situated, was, in fact, attending A. A. meetings as directed.

Warner's uncontroverted testimony at trial was that the vast majority of the A.A. meetings that he attended involved discussions about God, how hopeless an alcoholic was until he or she accepted God into his or her life, and how to start praying. On January and February 1991, Warner told Terwilliger that the A. A. meetings were

too religious-based for him, but Terwilliger persisted to direct Warner to attend the meetings.[2]

On August 4, 1992, before the Town of Woodbury Justice Court, Warner moved pursuant to N.Y.S. Criminal Procedure Law Section 440.20 to challenge the constitutionality of that part of his sentence which imposed, as an express condition of his probation, the requirement that he attend A. A. at the direction of his probation officer. The Justice Court never ruled on the constitutional issue and, instead, ruled that the motion was moot because the Probation Department presented Warner with suitable alternatives to A.A.

II. The Religious Nature of the Twelve Step Program

The religiously indoctrinating nature of the Twelve Step program is explained in the two basic A. A. publications, *Twelve Steps and Twelve Traditions*, and *Alcoholics Anonymous*, commonly referred to as the "Big Book". Both of these books were received in evidence at trial.

Twelve Steps and Twelve Traditions ("TSTT") "presents an explicit view of the principles by which A.A. members recover and by which their Society functions." (Preface TSTT 15) "It is hoped," write the authors, "that this volume will afford all who read it a close-up view of the principles and forces which have made Alcoholics Anonymous

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[2] During the spring and summer of 1991, Terwilliger perceived Warner as "13 stepping", which meant that Warner was critical of the program and didn't see any sense in it. Thus, one of Terwilliger's "behavioral objectives" for Warner for the quarter following August 13, 1991, was that Warner attended A.A. "Step meetings" and, on October 16, 1991, Terwilliger so directed Warner. Step meetings were distinct from the other kinds of A.A. meetings in that at a Step meeting the group discussion would be confined to one particular Step of the Twelve Steps. One of Terwilliger's behavioral objectives at the end of the period from November 14, 1991, to February 13, 1992, was for Warner to "attend three A.A. step meetings every week, and obtain a sponsor". Terwilliger viewed Warner's attendance at three Step meetings per week as an objective which was part of Warner's "working the Steps" of the program.

what it is." (Preface TSTT 18) The book elaborates, chapter by chapter, upon each of the Twelve Steps. (See Appendix B. at pps. 3a - 8a).

The District Court found that *Alcoholics Anonymous* (the "Big Book") is "A.A.'s basic text" and that "the central theme" of the book is the "emphasis on a higher power". As "an all-purpose guide for anyone having problems working the Twelve Steps", the Big Book's main object is 'to enable [the reader] to find a Power greater than [himself] which will solve [his] problem," and that it is "spiritual as well as moral." (See Appendix C. at p. 9a).

A preliminary step in the A.A. program requires the participant to admit the existence "of a Creative Intelligence, a Spirit of the Universe underlying the totality of things. . ." (Big Book, page 46). Once this step is taken, the participant is to be possessed with a new sense of "power and direction." The program provides that "[a]t the start, this was all [the participant] needed to commence spiritual growth, to effect [his] first conscious relation with God as [he] understood Him." (Big Book, page 47) As soon as the participant can say that "he does believe, or is willing to believe, . . .[the program] emphatically assures him that he is on his way" and that a "wonderfully effective spiritual structure can be built." (Big Book, page 47)

Reasons For Denying The Writ

I. It Is Well Settled That the Twelve Steps of Alcoholics Anonymous Constitute Religious Doctrine and Practice Within the Meaning of the Establishment Clause of the First Amendment

The Orange County Probation Department contends that certiorari should be granted so that this Court can determine whether A.A. is "sufficiently religious" for Establishment Clause purposes. The Probation Department misleads this Court by stating that this issue has resulted in a "split of opinions around the country". The Probation Department then contends that this "split" has been caused by some courts using the three-pronged *Lemon* test and others using the *Lee v.*

Weisman coercion test. The Probation Department then asks this Court to end this "confusion".

Actually, the only entity "confused" by this issue is the Probation Department. Its confusion begins with its apparent belief that whether a court applies *Lemon* or *Lee* will make a difference on the threshold issue of whether the Twelve Steps constitute religious practice. The Probation Department's confusion continues with its disingenuous attempt to convince this Court that two discredited district court opinions have caused a "split of opinions around the country".

In *Griffin v. Coughlin*, 88 N.Y.2d 674 (1996), *cert den* 519 U.S. 1054 (1997), the New York Court of Appeals observed that the A.A. literature "demonstrates beyond peradventure that doctrinally and as actually practiced in the 12-step methodology, adherence to the A.A. fellowship entails engagement in religious activity and religious proselytization." The N.Y. Court of Appeals explained that followers of the Twelve Steps

> are urged to accept the existence of God as a Supreme Being, Creator, Father of Light and Spirit of the Universe. In "working" the 12 steps, participants become actively involved in seeking such a God through prayer, confessing wrongs and asking for removal of shortcomings. These expressions and practices constitute, as a matter of law, religious exercise for Establishment Clause purposes, no less than the nondenominational prayer in *Engel v Vitale* (370 US 421), that is, "a solemn avowal of divine faith and a supplication for the blessings of the Almighty. The nature of such a prayer has always been religious'" (id., at 424 [emphasis supplied]; see also, *Lee v Weisman*, 505 US __, __, 112 SCt 2649, 2664 [Blackmun, J., concurring]).

Griffin, 88 N.Y.2d at 683 (emphasis in original). The *Griffin* Court further observed:

> [A] fair reading of the fundamental A.A. doctrinal writings discloses that their dominant theme is religious . . . Indeed, the A.A. basic

> literature most reasonably would be characterized as reflecting the traditional elements common to most theistic religions. Thus, God is named or referred to in five of the 12 steps . . . While A.A. literature declares an openness and tolerance for each participant's personal vision of God ("*as we understood Him*" [Steps 3 and 11] [emphasis in the original]), the writings demonstrably express an aspiration that each member of the movement will ultimately commit to a belief in the existence of a Supreme Being of independently higher reality than humankind . . . Aside from the obvious difficulty in conceptualizing how one could perform a confessional of "wrongs" (Step 5) or seek, through "prayer," "contact" (Step 11) with a God devoid of religious content," and even if "A.A. permits a secular interpretation of its doctrines and practices, undeniably its paramount theme . . . favors a religious interpretation.

Griffin, 88 NY2d at 681-682, 689. These findings led the Court of Appeals to reject the New York Attorney General's position that "the Establishment Clause was not violated because other A.A. writings suggest a toleration of belief in a "God" as merely some "Higher Power" without any religious content". *Griffin*, 88 NY2d at 688. The Court concluded that the Attorney General's "defense fails under the 'wholesome *neutrality*' requirement of the Establishment Clause." *Griffin*, 88 N.Y.2d at 689, *citing Abington School Dist. v Schempp*, 83 S.Ct. 1560, 1571-72 (emphasis supplied in *Griffin*).

Even if this Court were to go so far as to accept the Probation Department's suggestion that words like "God" and "prayer" and "Him" and "Higher Power" and "spirituality" can be given a neutral or secular "spin" (which, of course, they really can't), the Establishment Clause would still be violated. This is because the First Amendment "forbids" even "subtle departures from neutrality". *Gillette v United States*, 401 U.S. 437, 452 (1971) . . . *quoted in Church of Lukumi Babalu Aye v Hialeah*, 113 S.Ct. 2217, 2227 (1993). The religious indoctrination inherent in a departmental policy of recommending, endorsing and using the Twelve Steps is not erased, or even minimized, simply by labeling it "spiritual" or "therapeutic".

The Probation Department's heavy reliance upon A.A.'s conclusory, self-serving disclaimer that the Twelve Step process is not "religious,"[3] not only has been rejected by the New York Court of Appeals,[4] it is presently being *uniformly* rejected in the federal courts.

In *Kerr v Farrey*, 95 F.3d 472, 497-480 (7th Cir. 1996) the Seventh Circuit Court of Appeals rejected the argument that the "program escaped the 'religious' label because the twelve steps used phrases like 'God, as we understood Him,' and because the warden indicated that the concept of God could include the non-religious idea of willpower within the individual." The Seventh Circuit reasoned that because "[a] straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being."[5] *Id.* See, also, *O'Connor v State of Cal.*, 855 F.Supp. 303, 307-308 (C.D.Cal. 1994) which, prior to *Kerr*, drew the same conclusion that A.A., for purposes of First Amendment analysis, is not only religious, but specifically "monotheistic" in its basic principles:

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[3] The Probation Department also suggests that because A.A. purportedly does not embrace one particular religion it does not violate the First Amendment. But even assuming that the A.A. requirement does include the principle of non-affiliation, this still would not remove it from the scope of the Establishment Clause. In *Abington v Schempp*, 374 U.S. at 216, the Supreme Court observed how it "has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another." *Abington*, 374 U.S. at 216. See, also, *Grand Rapids School Dist. v Ball*, 473 US 373, 382, where this Court observed that the government must "maintain a course of neutrality among religions, and between religion and nonreligion. . . "

[4] *See, Arnold v Tennessee Board of Parole*, 956 S.W.2d 478 (Tenn. 1997) (Supreme Court of Tennessee held that a prisoner's failure to attend A.A. meetings could not be considered in the decision to grant or deny parole because the State cannot require participation in A.A. therapy without offering a secular alternative)

[5] The Seventh Circuit went on to point out that the phrase "God, as we understood Him," stressed by the Probation Department to show the so-called flexibility of the "God" concept, really works against the State, since the phrase refers to God as "Him". *Kerr*, 95 F.3d at 480. The Seventh Circuit determined that the Twelve Steps are "fundamentally based on a religious concept of a Higher Power." *Kerr*, 95 F.3d at 480.

> Spirituality is a central part of the Alcoholics Anonymous philosophy, and the program contains religious overtones. While A.A. is not a "religion" -- various faiths may all participate without renouncing their religious convictions -- a review of the "Big Book of Alcoholics Anonymous" reveals that it is founded on monotheistic principles.

The Second Circuit below stated that it had "little difficulty concluding that the constitutional line was crossed" by the government's endorsement of, and requirement of participation in, the Twelve Step program. Addressing the disclaimer argument now being propounded to this Court by the Probation Department, and specifically that argument's reliance upon *Stafford v Harrison*, 766 F.Supp. 1014 (D.Kan. 1991),[6] the Second Circuit observed that

> *Stafford* involved a mandatory prison-based substance abuse program, structured around the principles of A.A. The court upheld the program, arguing that A.A.'s notions of a "higher power" and "God" were sufficiently flexible and non-denominational that the program could not be said to constitute a "religion." This is a misapplication of First Amendment doctrine, which prohibits coerced participation in religious exercise of any variety for its favoritism of religion over non-religion. We decline to follow that case, which has been criticized for misreading relevant Supreme Court precedent.[7]

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[6] The *Stafford* court, pointing to the disclaimer in the "Big Book", held that "[w]hile the spiritual nature of Alcoholics Anonymous cannot be denied, the court is not persuaded this program is a religion." 766 F.Supp. at 1016. The holding in *Jones v Smid*, (4-89-CV-20857), the unpublished 1993 Southern District of Iowa decision also cited in the instant petition, expressly adopted the reasoning in *Stafford*.

[7] In the District Court decision below, the reasoning in *Stafford* was found faulty and rejected as follows:

> The case upon which Defendant relies for the proposition that A.A. is not a religious organization, *Stafford v Harrison*, 766 F.Supp. 1014 (D.Kan. 1991), draws its legal justification from a misapplication of Justice Douglas' concurring opinion in *U.S. v. Seeger*, 380 U.S. 163 (1965). *Stafford* finds that "the belief

Stafford was also rejected in *Scarpino v Grosshiem*, 852 F.Supp. 798, 804 (S.D.Iowa 1994) which described the reliance upon A.A.'s disclaimer as "dubious."[8]

After the hearing on remand in June of 1997, the District Court below made the further finding that "[t]he A.A. program for combating addictive alcoholism is deeply religious." (15a)

In *Warburton v. Underwood*, 2 F.Supp.2d 306 (W.D.N.Y. 1998), a district court rejected a qualified immunity defense by finding that the plaintiff had a *clearly established right* in 1998 not to be coerced into a Twelve Step program by New York State.

As observed by one commentator, "judicial consensus is emerging behind the proposition that AA is a religious program for Establishment Clause purposes. Therefore, courts facing cases that involve the issue of AA's religiousness should devote little, if any, analysis to this question." 97 Columbia Law Review, 437, 448 (March, 1997) The Twelve Step modality of indoctrination does not lose its religiosity simply because the County might be of the view that A.A. is effective or that some people might need it to keep them sober.

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in a Supreme Being 'cannot be sustained as a distinguishing characteristic of religion.'" The passage from *Seeger* cited by the *Stafford* court stands not for the proposition that reference to a Supreme Being does not make something a 'religion', but for the proposition that belief in a Supreme Being is not a prerequisite for a religion. In fact, Douglas specifically notes Hinduism and Buddhism as religions which do not include a concept of a Supreme Being. As a result, we base our analysis upon decisions of the Supreme Court rather than upon *Stafford*. (109a)

[8] Also refusing to follow *Stafford* and adopt the sort of selective and misleading references to the A.A. literature that can be found in the instant petition, the District Court in *O'Connor* took the following quote as revealing:)

> This is the how and why of it. First of all, we had to quit playing God. It didn't work. Next, we decided that hereafter in this drama of life, God was going to be our Director. He is the Principal; we are His agents. He is the Father, and we are His children. Most good ideas are simple, and his concept was the keystone of the new and triumphant arch through which we passed to freedom . . .

O'Connor, 855 F.Supp. at 307, n. 6.

The fact remains that the Twelve Steps of A.A. is a program of indoctrination which methodically induces its participants to understand their problems in theistic terms, to pray to "God" and to surrender their wills over to that "God".

The primary problem with the Probation Department's argument is that it would guarantee the government's ability to circumvent the Establishment Clause in every challenge to state-endorsed religious indoctrination. If states and municipalities were permitted to use traditionally religious terms simply on their claim that such terms are not to be taken literally, but as mere metaphorical tokens, then accountability under the First Amendment would become impossible. *See, e.g., Robinson v City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), which, rejecting a request to go behind the objective[9] significance of a traditionally religious symbol, observed that an argument which would discard the objective standard "could always 'trump' the Establishment Clause." *Id.*

The Probation Department's argument, with its proffered interpretation of "God" and "prayer" as state-of-the-art terms within the treatment industry, similarly asks that the objective standard be discarded and that plainly religious language not be taken at face value. At the very least, however, the First Amendment must forbid government from using language conventionally understood as religious as a tool for social engineering. Otherwise, any governmental entity, such as Orange County's Probation Department, which has a policy of making sure people are exposed to a religiously proselytizing program, always would be able to "trump" the Establishment Clause by simply saying that when it uses the word "God" it doesn't mean God, and when it urges people to "pray to God" it really is telling them to do something non-religious.

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[9] Instead, the Tenth Circuit applied the objective standard enunciated in *County of Allegheny v American Civil Liberties Union* (492 U.S. 573) and looked "only to the average receiver of the government communication or average observer of the government action." *Robinson v City of Edmond, supra.*

Similarly, the Probation Department's Free Exercise balancing argument fails. If this Court were to approve the Probation Department's exclusive endorsement of the Twelve Steps on the theory that working them is good for certain types of people because "God" has a therapeutic, non-religious significance, the variety of opportunities to "trump the Establishment Clause" would be virtually limitless. Nothing then could stop any governmental entity from requiring the working of the Twelve Steps as a condition of, say, child visitation, or public or government-regulated employment, or even a student's right to remain in public school. As the New York Court of Appeals correctly observed in *Griffin*, "[a]dopting a balancing approach here would be unprecedented and raise serious implications beyond the prison context."[10]

The Probation Department's effort to psychologize, and thereby secularize, the Twelve Steps -- by deconstructing the words "God", "Him", "prayer" and "spiritual awakening" as mere metaphors -- also has the effect of degrading[11] traditional religious beliefs and insulting those who hold them. This is because the Probation Department is telling this Court (and the citizens of Orange County, New York) that the word "God" has no objective referent and that, despite one's

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[10] Free Exercise cases such as *O'Lone v Estate of Shabazz*, 482 U.S. 342; *Turner v Safley*, 482 U.S. 78; and *Pell v Procunier*, 417 U.S. 817 involve personal, rather than public, constitutional rights. In *O'Lone*, for example, a case involving a claim under the Free Exercise Clause, this Court held that a balancing is permitted between an inmate's personal right to engage in his religion's rituals and practices and the State's penological and administrative interests. Obviously, there are some religious practices that a prison simply cannot accommodate for reasons of security, order or economy. However, such balancing between personal freedoms and penological objectives has absolutely nothing to do with the Establishment Clause. Under the Establishment Clause, State institutional objectives may never justify State religious indoctrination.

[11] *See, Engel v Vitale* (370 U.S. 421), where this Court stated that a "union of government and religion tends to destroy government and to degrade religion."

religious convictions, "God" and "prayer" are nothing more than useful slogans in carrying out the County's therapeutic objectives.[12]

Whether the Court applies *Lemon* or *Lee*, the threshold question remains the same: are the Twelve Steps religious? The answer to this threshold question, as discussed above, has been obvious to American appellate courts. What the Probation Department is doing is precisely what the Establishment Clause was intended to prevent. It is perverting religious language to serve the purposes of the County.

II. It Is Well Settled That Government Coerced Attendance at Alcoholics Anonymous Meetings Violates the Establishment Clause of the First Amendment

Without any precedential authority whatsoever, the Probation Department requests this Court to (1) ignore every American appellate court that has confronted this issue[13] and (2) somehow use the *Lemon* test -- as opposed to the *Lee v Weisman* coercion test -- to reason that Orange County's policy of recommending to sentencing judges that probationers be required to attend A.A. meetings does not violate the Establishment Clause.

"Whether the key word is 'endorsement', 'favoritism' or 'promotion', the essential principle remains the same. The Establishment Clause at the very least prohibits government from *appearing* to take a position on questions of religious belief . . ." *County of Allegheny v American Civil Liberties Union*, 492 U.S. 573, 593-594 (1989)(emphasis added).

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[12] *Compare*, Bertrand Russell, *Can Religion Cure Our Troubles?*, in *The Basic Writing of Bertrand Russell*,Egner & Dennon, Eds., Simon & Schuster, 1961, at page 600: "I can respect the men who argue that religion is true and therefore ought to be believed, but I can only feel profound moral reprobation for those who say that religion ought to be believed because it is useful, and that to ask whether it is true is a waste of time."

[13] *Kerr v Farrey, Griffin v Coughlin, Arnold v Tennessee, Warner v Orange County*

Petitioner's policy of recommending to *all* sentencing courts throughout the County that anyone with an alcohol problem who is sentenced to probation should be required to attend A.A. meetings as a condition of probation, without recommending any secular alternative, makes it *appear*, "at the very least," that the State has "take[n] a position on questions of religious belief." *Id.* There is no intellectually honest way to deny this fact. As long as the Probation Department has the policy of seeing that probationers are required to attend and listen to the religiously proselytizing language of A.A., the objective *appearance* of government-endorsed religiosity is undeniable.

The *Griffin* Court had no trouble concluding that the use of the A.A. Twelve Step program by New York's prison system "as an essential component of an exclusive, compulsory attendance . . . [p]rogram violates the Establishment Clause."

Petitioner at bar, making virtually the same argument made by the New York State Attorney General in his petition for certiorari in *Griffin*, wants this Court to disregard fundamental Establishment Clause jurisprudence in order to reinstate the Probation Department's County-wide program of coerced religious indoctrination. Petitioner is asking this Court to approve a new civic religion[14] of secular spiritualism which demands recognition and acceptance of a distinction between religious belief in "God", on the one hand, and secular belief in a spiritual "Higher Power" expressed in traditional religious terms, on the other. Petitioner is essentially arguing that so long as the Probation Department (or its adjunct, such as A.A.) disclaims affiliation with any religion and insists that the word "God" can mean anything one wants it to mean, the Probation Department is free to exhort its probationers -- using traditionally religious language -- to hand their wills over to a spiritual Higher Power, to acknowledge that

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[14] *See, Lee v Weisman*, 120 L.Ed.2d 467, 482-83 (1992) where Justice Kennedy, writing for the majority, stated that "[t]he suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."

they are otherwise powerless, and to pray every day for the rest of their lives.

The compelling nature of this Establishment Clause violation, which distinguishes it from other, less flagrant governmental practices previously held by this Court to be violative of the separation between church and state, is underscored by the threat of imprisonment if Warner failed to "attend Alcoholics Anonymous at the direction of [his] probation officer." *See* N.Y. Penal Law Secs. 60.01(4) and 65.00(2); Veh.Traf.Law Secs. 511(2)(b) and 1193.[15] The pressure put upon Warner to attend A.A. meetings is the very sort of direct, overt compulsion which the drafters of the First Amendment found to be intolerable. The Courts below quite properly and without difficulty determined that Warner was coerced to attend A.A. meetings.[16]

Moreover, the Probation Department obfuscates the difference between the coercion which forced Warner to attend the three A.A. meetings per week with the amount of damages he may have suffered. Such an argument has no precedent in Establishment Clause

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[15] The statutory scheme is clear and straightforward. Section 65.00(2) of the Penal Law provides that if a plaintiff violates a condition of his probation the Court may revoke the sentence at any time prior to the expiration or termination of the period of probation. Section 60.01(4) of the Penal Law provides that if the probationary sentence is revoked, the court must sentence the plaintiff to a term of imprisonment or imprisonment combined with probation ("split bid"). *See also,* Veh.Traf.Law, Section 511(2)(b) (providing a sentence which includes a fine of not less than five hundred dollars; and either a term of imprisonment not to exceed one hundred and eighty days, or an additional sentence of probation); *see also,* Veh.Traf.Law, Section 1193 (providing a sentence which includes a fine of not less than two hundred and fifty dollars and not more than three hundred and fifty dollars, or by imprisonment in a penitentiary or county jail for not more than fifteen days, or by both such fine and imprisonment).

[16] No probation violation can occur without the Probation Department's determination that a violation petition should be filed. It is the fear that a probation officer will exercise his authority to file such a violation petition that operates as coercion to obey each and every directive of a probation officer. Surely the Probation Department is not suggesting to this Court that it is the sentencing court that tells the probation officer when a violation petition should be filed.

jurisprudence, and properly so. The fact that Warner was able to maintain his atheism in the face of religious indoctrination does not make his state-mandated exposure to such indoctrination constitutional.

In its opinion below, the District Court did not analyze nor rest its conclusions of law upon the three-pronged test articulated in *Lemon v Kurtzman*, 403 U.S. 602 (1971)[17] Instead, Judge Goettel based his determination upon the holding of *Lee v Weisman* that government cannot coerce anyone to participate in religion in a way which establishes or tends to establish a state religious faith.[18] This formulation of Establishment Clause law is very close to the second *Lemon* prong.

The Probation Department now argues the applicability of the *Lemon* three-prong test. This test arguably lost some of its authoritativeness in the 1980's,[19] but its force now appears to have been re-established.[20] It is Warner's position that whether or not the

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[17] This Court, in *Lemon v Kurtzman*, 403 U.S. 602 (1971), promulgated a three-pronged test for determining whether a challenged governmental act is permissible under the Establishment Clause: first, the act must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and third, the act must not foster excessive entanglement with religion.

[18] The Second Circuit took essentially the same position. (40a)

[19] *See, e.g., Marsh v Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (applying an historical analysis to the question of whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violated the Establishment Clause).

[20] *See, e.g., County of Allegheny v ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1991) where the Supreme Court indicated a return to the three-pronged test, putting emphasis on the second prong -- the appearance or effect of endorsing religion. *See also, Chabad-Lubavitch of Georgia v Miller*, 976 F.2d 1386, 1392 (11th Cir. 1992); *Otero v State Election Bd. of Oklahoma*, 975 F.2d 738, 740 (10th Cir. 1992) (holding that the three-pronged test has been criticized but never abandoned); *Jones v Clear Creek Independent School Dist.*, 977 F.2d 963, 966 (5th Cir. 1992).

Lemon test is utilized the conclusion is inexorable that the practical effect of coercing probationers to work the Twelve Steps results in an unconstitutional establishment of religion prohibited by *Lee v Weisman.*

Applying the three-pronged *Lemon* test to the instant challenge, Warner first concedes that the requirement that a probationer make an effort to overcome his addiction serves a secular purpose; there is no issue with respect to the first prong of the *Lemon* test. However, Warner submits that the Probation Department's policy of using the Twelve Steps violates both the second and third prongs of the test in that a principle or primary effect of requiring attendance and acceptance of the A.A. doctrine advances religion, or at a minimum fosters an excessive, and unnecessary, entanglement with religion.

The fallacy of the Probation Department's argument lies in its treatment of the first and second prongs of the *Lemon* test as though they are interchangeable. After indicating that the "purpose" of A.A. is secular and therefore satisfies the first prong, the Probation Department pretends to address the second prong by arguing that the principle or primary effect of encouraging participation in A.A. is not to advance religious belief but to treat substance abuse. This crafty argument restates A.A.'s professed purpose while obscuring the issue of A.A.'s effect.[21] Indeed, the Probation Department never comes to terms with the question of whether its policy of using the Twelve Steps has the effect of advancing religious belief. Its reason for avoiding this question is rather obvious.

Finally, in *Lamb's Chapel v Center Moriches Union Free School District,* 124 L.Ed.2d 352, 363 n 7 (1993), a six-justice majority observed that "we return to the reality that there is a proper way to inter an established decision and Lemon, however frightening it might be to some, has not been overruled."

[21] It is one thing to try simply to get a substance abuser to overcome his addiction. It is quite another to get him to hand over his will to "God" and to get him to see himself as having to petition that "God" every day for the rest of his life, that is, work the Twelve Steps.

The District Court below, on the other hand, addressed this issue squarely when it determined "that sending probationers to rehabilitation programs which engage in the functional equivalent of religious exercise is an action which tends to establish a state religious faith." (94a) The District Court correctly noted that while the Probation Department may not have intended to establish a state religious faith, "the practical effect of coercing probationers into the exercise of religion is to tend towards a state-mandated and state-approved religion." (94a) The result reached by the District Court is mandated by the First Amendment. A government agency may not require anyone, including probationers, to accept the Probation Department's claim that words like "God" and "prayer" and "Him" and "Higher Power" and "spirituality" and "faith" -- as these words are used in the Twelve Steps -- have non-religious significance.

The exhortations contained in the Twelve Steps become no less repugnant to the Establishment Clause simply because the probationer might (theoretically) be told that he can interpret them in non-religious terms. The fact that a person might be able to maintain his atheism (or his particular form of religious conviction) in the face of indoctrination administered in A.A.'s anthropomorphic, monotheistic terms does not make his state-mandated exposure to such indoctrination constitutional. The Twelve Step requirement still violates the second and third prongs of the *Lemon v Kurtzman* (403 U.S. 602) test in that a principal or primary effect of requiring acceptance of the A.A. doctrine advances religion, and at a minimum fosters an excessive, and unnecessary,[22] entanglement with religion.

The Probation Department seems to argue that the specific references to "God" and "Him" can somehow be ignored and that there is nothing wrong with the State methodically inducing probationers to understand their problems in "spiritual" terms and to surrender their

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[22] The religious entanglement is "unnecessary" in the sense that the State can achieve the goal of alcohol rehabilitation without coercing individuals to practice religion. There are secular alternatives to A.A.

wills to a spiritual "Higher Power". Apart from the unintelligibility of its spiritual-but-secular "Higher Power", the Probation Department is making the constitutionally erroneous assumption that there is nothing wrong with the County dictating the terms in which human existence is to be understood or in asserting the existence of such entities as "a Spirit of the Universe underlying the totality of things." As this Court has made clear, matters such as "one's own concept of existence, of meaning, of the universe, and of the mystery of human life" -- matters that "define the attributes of personhood" -- must never be "formed under compulsion of the State." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 2807 (1992).[23] A probationer, like any other person,[24] must be permitted to maintain the integrity of his intellect, for such integrity is essential to the preservation of human dignity and, thus, a free society.[25]

Moreover, the Establishment Clause violation does not occur solely within the confines of the mandated A.A. meetings. It is the religious foundation of the entire County program, together with the Probation Department's exclusive endorsement of it and their coercion of Warner and other probationers to participate in it, which violates the First Amendment.

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[23] *See, also, Lee v Weisman,* 112 S.Ct. at 2665, stating: "There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience. Even subtle pressure diminishes the right of each individual to choose voluntarily what to believe."

[24] "A human being does not cease to be human because the human being is a prisoner of the state." *Ward v Walsh,* 1 F.3d 873, 876 (9th Cir. 1993) *cert den* 114 S.Ct. 1297.

[25] "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. * * * It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to the followers of the orthodox faiths." *Board of Educ. v Barnette,* 319 U.S. 624, 640-642.

Coerced[26] participation in a program based upon the Twelve Steps is considerably more than mere exposure to religious ideas or the mere use of the word "God", as the Probation Department appears to argue. It is overt religious indoctrination. To analogize it to the *Marsh v Chambers* chaplain's prayer, and to distinguish *Lee v Weisman* on the theory that adult probationers are not as susceptible as children, ignores the fact that the very premise of the Orange County program is that the participant *is* susceptible. Otherwise, the Probation Department's program makes no sense at all.

In *Engel v Vitale*, 370 U.S. 421 (1962) this Court held that New York's *recommendation* to the local school boards that they adopt the practice of daily prayer[27] violated the Establishment Clause: "We think that by using its public school system to encourage recitation of the Regent's prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause." *Engel*, 370 U.S. at 424. It is equally clear that by using its probation system to encourage working the Twelve Steps, without providing a secular alternative, the County of Orange has adopted a practice wholly inconsistent with the Establishment Clause.

Finally, the Probation Department makes a throwaway argument that if recommending attendance at A.A. meetings violates the Establishment Clause, then it mattes not if probationers are given a secular choice. (17) First, the Probation Department bases this argument upon comments made by Judge Winters in a dissent that he expressly *withdrew*. (5a) Second, this case does not involve the issue

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[26] The fact that Warner had the option of forgoing probation -- for *imprisonment* (a rather silly argument) -- is of no moment. Once the County provides such a program, it must do so in a manner that does not infringe upon constitutional rights. *See*, *Board of Education v Grumet*, 114 S.Ct. at 2497, where Justice Souter, expressing the view of the majority, stated that the Religion Clauses of the Constitution "all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."

[27] "This daily procedure was adopted on the recommendation of the State Board of Regents." *Engel*, 370 U.S. at 422.

of whether the Establishment Clause would be violated if the government offered a secular alternative to A.A. Third, an argument could be made that whether offering an alternative would comport with the Establishment Clause would depend upon how it was offered. If the Probation Department offered A.A. as one of a number of acceptable treatment programs without expressing any preference for A. A. over the others, then it could be argued that the Department has fulfilled its duty of neutrality on matters of religious belief.[28]

III. The Department of Probation Is Constitutionally Responsible for its Policy of Requiring Probationers to Work Through the Twelve Steps of A.A.

A. Foreseeability is a Question of Fact

The Court of Appeals below correctly applied the principle enunciated in *Malley v. Briggs*, 475 U.S. 335, 334 n. 7 (1986) that defendants sued under Section 1983 are "responsible for the natural consequences of [their] actions". Any assertion by Orange County that the imposition of Warner's sentence necessarily broke the "causal chain" is "inconsistent with [this Court's] interpretation of Sec. 1983." *Malley v. Briggs*, 475 U.S. at 344 n. 7. The foreseeability of the sentencing court's adoption of the Probation Department's recommendation that Warner attend A.A. "is a question of fact" (32a) which was properly determined by the District Court and properly reviewed and affirmed by the Court of Appeals.

B. The Finding of Foreseeability is not Clearly Erroneous

There is no basis for setting aside the Second Circuit's determination that, "[g]iven the neutral advisory role of the probation officer toward

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[28] By analogy, there is no question that the State can require all children be educated. It does not violate the Establishment Clause for the State to indicate that this requirement might be met by attendance at parochial schools, rather than the secular public school.

the [sentencing] court, it is an entirely 'natural consequence[]'. . . for a judge to adopt the [Probation Department's] recommendations as to a therapy provider without making an independent investigation of the qualifications and procedures of the recommended provider." (31a-32a) Anyone familiar with our criminal justice system knows that "[s]uch action by a judge is neither 'abnormal' nor 'unforeseen'." (32a)

Based upon the *undisputed* evidence, the Probation Department's "recommendation that Warner be required to participate in A.A. therapy was unquestionably made pursuant to a general policy." (27a-28a) The Probation Department promulgated the use of A.A. as a condition of probation to every criminal judge in Orange County whenever the prospective probationer's use of alcohol was an issue. No court ever ordered the Probation Department to make A.A. one of its standard conditions for probationers with alcohol problems. There is also no dispute that it was the Probation Department's policy to use the Twelve Steps of A.A. to monitor probationers and that this policy was not forced upon the Probation Department by any criminal judge. As stated by the District Court, "the idea of requiring [Warner] to attend A.A. as a condition of probation originated with the Probation Department, not with the judge." (92a)

Indeed, the *undisputed* facts confirm the Second Circuit's observation that a sentencing court's "adoption of the probation officer's recommendation is particularly likely when the recommendation deals with a provider of therapy" and that "courts generally rely heavily on [such] probation department recommendations." (32a) The record shows that the Probation Department initiated the idea of requiring A.A. without ever consulting or seeking permission from a single criminal court judge. No court ever issued an order directing the Probation Department to use the Twelve Steps to monitor its probationers or to direct probationers who might be "13-Stepping" to attend Step meetings. In fact, the record is devoid of any proof that there was a single criminal court in Orange County which even knew what the Twelve Steps are or that the Probation Department was using them.

But *if* Warner's sentencing judge *had* questioned the Probation Department about the nature of A.A., the Department would have told that judge that A.A. is *not religious*, since this is the position the Department *has always taken and continues to take* in the instant petition. Thus, implicit in the County's superseding cause theory is the untenable, wholly unrealistic, assumption that a sentencing judge would go behind the Probation Department's self-serving description of A.A. and make further inquiries elsewhere. This is why there is no substance to the County's complaint that the Second Circuit's decision implies that sentencing courts merely "rubber stamp" Probation Department recommendations.[29]

"Findings of fact . . . shall not be set aside unless clearly erroneous . . " Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer* City, 470 U.S. 564, 572 (1985). The salient factual finding below -- that there was "a high likelihood that a judge would follow" the Probation Department's standard A.A. recommendation -- was based upon an uncontroverted record and was definitely not "clearly erroneous". (32a-33a) The requirement that Warner attend A.A. was the result of the Probation Department's long-standing, systematic *and exclusive* use of the Twelve Steps throughout Orange County, *not* the exercise of an individual sentencing judge's informed discretion. As stated by the District Court:

> Even though technically it is the judge, not the Probation Department, that imposes conditions of probation, in reality the Probation Department was responsible for Warner's having to attend A.A. The Constitution deals with realities, not technicalities.

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[29] Of course, even if a sentencing judge decided to attend an A.A. meeting himself -- just to make sure he wasn't being a "rubber stamp" -- that judge, just like Warner, would be told by the A.A. members that the Probation Department was right and that A.A. is *not* religious. The sentencing judge would have to go further and sit in on sessions like the ones between Terwilliger and Warner, in which Terwilliger accuses Warner of "13-stepping" and directs him to go to Step meetings. That judge would also have to read the A.A. literature.

(92a) The Probation Department's contention to the contrary amounts to nothing more than a factual argument already rejected by the courts below.

C. The County's Distortion of the Sentencing Process

The County's factual argument is also misleading. In its Petition, the County states that the issue of foreseeability "should have been framed" by the lower courts "as whether it was foreseeable that a ten-year avowed atheist who had attended four (4) or five (5) A.A. meetings, some of which were held in churches and each of which began and ended with a prayer, would have voiced some objection, either at the time of sentencing, or within the time-frame allowed to appeal from a sentence." (9-10) Nothing in this record, however, even *suggests* that the Probation Department, when it made its recommendation to Warner's sentencing judge, had any notice, actual *or* constructive, of either Warner's atheism or his observations at the A.A. meetings he attended.

In the same vein, it is misleading for the County to state that the Probation Department's recommendation to the sentencing judge was that "Warner *continue* as a condition of probation his previously voluntary attendance at A.A." (27) This, too, is simply not true. The Probation Department provided Warner's sentencing judge with the Department's *preprinted* form entitled, "Additional Conditions of Probation Pertaining to Alcohol". This *preprinted* form, which is provided to the sentencing court whenever alcohol is an issue (Joint Appendix to Court of Appeals, 137a), states to the prospective probationer, "That you will attend Alcoholics Anonymous at the direction of your Probation Officer." (Joint Appendix to Court of Appeals, 21a) This form was attached to Warner's probation report in case the judge decided to sentence Warner to probation; *not*, as the County disingenuously states, as a recommendation that "Warner be allowed probation, rather than be incarcerated, with the 'special' condition that he *continue* his attendance at A.A. meetings" (5, emphasis added)

The County's motive for distorting the record in this manner is obvious. By creating the mis-impression that the Probation Department recommended that Warner receive probation so long as he *continued* to attend A.A. meetings, the County makes it appear as though the sentencing court was focused upon the choice of therapy provider, as opposed to the mere basic question of whether probation and alcohol therapy were even appropriate. The County obfuscates the Court of Appeals' important distinction between "the selection of a therapy provider", which was made, as a matter of county-wide policy, by the Probation Department, and the "determination of appropriateness of probation and of alcohol therapy", which is made, on a case-by-case basis, by the sentencing judge. (32a, n. 4)

D. The County's Immunity Argument

The County also makes the impermissible and meritless argument that Warner's injury was not foreseeable because the Probation Department's conduct was "objectively reasonable". *See, e.g.*, Petition, p 28 ("If it was objectively reasonable for county officials to have recommended the later-determined 'offensive' condition, how was the 'harm' foreseeable'?") This argument must be rejected for three reasons.

First, by pointing to the purported "objective reasonableness" of the Probation Department's conduct, the County is attempting to raise the defense of immunity which it *waived* by never raising the issue until its reply brief on appeal. (27a, n.1)[30] The Second Circuit, citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) rightly refused to hear the County on the question of immunity, since "[a]n issue raised for the first time on appeal is not properly before th[e] court". (27a, n.1)

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[30] Not only did the County "fail to ever raise[] a defense of immunity before the district court", its "failure to raise the issue on appeal in its initial brief deprived Warner of the opportunity to dispute the question and deprived the court of the benefit of both side's briefing." (27a, n.1)

Second, even if there had not been a waiver, the Court of Appeals, citing *Owen v. City of Independence*, 445 U.S. 622 (1980), correctly observed that the defense of immunity is not available to a municipality. (41a, n 9)

Third, the County's remarks about the "objective reasonableness" of the Probation Department's recommendation of A.A. has no bearing upon the factual issue of the "foreseeability" of the sentencing court's adoption of that recommendation. The question of "objective reasonableness" is one of law: whether the Probation Department's recommendation violated a clearly established constitutional right at the time it was issued. The question of "foreseeability", on the other hand, is one of fact: whether it was a foreseeable consequence of the Probation Department's recommendation that Warner would be required to attend A.A. as a condition of his probationary sentence. In its Petition, the County argues as though these two questions are one and the same, but, in fact, they are quite separate and distinct. The issue of foreseeability is not whether the "harm" flowing from the A.A. requirement was foreseeable, but whether the A.A. requirement, itself, was foreseeable. The latter question can be answered in the affirmative, even if the former were to be answered in the negative.

E. The Waiver and Consent Issues Were Fully Heard and Determined

The County states that the Courts below "focus[ed] exclusively" on foreseeability and proximate cause and "completely failed to apply or balance other equally important and applicable rules governing intentional torts, including superseding causes, waiver and consent." This statement is groundless. Not only was the Court of Appeals expressly mindful of these concerns, it went so far as to issue an Order of Remand (51a-53a) directing the District Court to conduct a hearing

and make specific findings so that these concerns would be fully addressed.[31]

Notably, the Court of Appeals issued its Order of Remand despite the County's failure to raise the issues of consent or waiver before the District Court and on its appeal. It was not until *after* Chief Judge Winters' dissent that the County (in its motion for *reargument*) ever took the position that Warner must have known that A.A. is religious -- a position which the District Court correctly observed is "directly contrary to [the County's] basic position that the A.A. program has no religious content." (12a)

F. The Issues on Remand Were Correctly Determined

The District Court's determination of the waiver/consent issue, like its determination of the issue of foreseeability, was in no way "clearly erroneous". Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer* City, *supra*. Indeed, the uncontroverted facts adduced at the remand hearing compelled the District Court's finding that there was no waiver or consent. As stated in the Court of Appeals' opinion, "the district court's factual findings are amply supported by the record, and its conclusion that there was no consent, wavier or forfeiture follows inevitably from these findings." (4a)

Based upon the undisputed evidence, the District Court found that, although the A.A. program is "deeply religious" (15a) and Warner perceived some of its religious aspects at the meetings he attended before his sentencing (16a), "[a]t these meetings, A.A. members attempted to convince him that their approach was not religious only 'spiritual' and that different people have different concepts as to what God is", and that "God could be anything, even a 'spoon'." (14a-16a) Although this "didn't make sense" to Warner at the time, he "wanted

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[31] The Court of Appeals explained that it "remanded to the district court for factual findings on these issues, and the district judge's findings dispel those concerns." (4a, n. 1)

to give Alcoholics Anonymous a fair hearing in [his] mind", and eventually "[c]oncluded that the organization of Alcoholics Anonymous lies when they say that they are not religious." (March 10, 1994, Oral Deposition of Robert Warner, pages 92-93)[32]

The uncontroverted proof at the remand hearing showed that it was not until long after Warner's sentencing, when his probation officer began directing him to obtain a sponsor and to attend Step meetings, that Warner "bec[a]me fully aware of the religious intensity of the step meetings." (14a) The District Court found that Warner "tried to reconcile his own perceptions with what others were telling him, but he gradually decided that they were wrong and were attempting to trick him." (15a)

There is no basis in the record to upset the District Court's determination that it was "[o]ver a period of two years" that "Warner ultimately became convinced that the A.A. program was religious, and that he was being subjected to religious indoctrination" (16a) and that Warner, therefore, did not knowingly or voluntarily waive, or in any other manner relinquish, his Establishment Clause right at the time of his sentencing or within the time he could have taken an appeal.

G. The County's "Independent Cause" Argument is Illogical

The County argues that "the judicial act of formalizing the [A.A.] recommendation constitutes an independent cause which supersedes the initial recommendation" of the Probation Department. (28)[33] The County therefore is forced to claim that "it was not foreseeable that Warner would not have voiced some concern" about the religious

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[32] Warner gave this testimony two and one half years *prior* to Chief Judge Winter's Dissenting Opinion, long before the issue of consent and waiver ever entered this litigation.

[33] This is assuming that the sentencing judge would not have "formalized" (28) the recommendation if Warner had objected to it.

nature of A.A. "after having voluntarily attended four or five A.A. meetings" before the date of his sentencing. (28) But, by making this latter claim, the County *contradicts* its main position that A.A. is not "sufficiently 'religious' to trigger the Establishment Clause of the First Amendment" (11)

On the one hand, the County argues that simply by attending a mere four or five A.A. meetings, *even without the benefit of the A.A. literature contained in this record*, Warner *must* have realized that the A.A. disclaimers about the program's religiosity were untrue.[34] On the other hand, the County points to the purportedly "flexible nature of A.A. and its accommodation of various spiritual and non-spiritual philosophies" (12) to argue that "[n]o reasonable person would view referral to A.A. as a governmental endorsement of religion" (13)

Thus, in order to make the argument that the judicial imposition of Warner's sentence broke the causal chain, the County is forced to assert that Warner's failure to object to (or appeal) his sentence was unforeseeable, the implication being that A.A. meetings (no matter what kind) are so blatantly religious that no reasonable person who attended them could have had any doubt about it. The problem with the County's argument is that the District Court found *otherwise*: that Warner *did* "tr[y] to reconcile his own perceptions with what others were telling him" at the meetings. (15a) As elsewhere in its Petition, the County is just rearguing facts that have already been determined below.

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[34] The District Court's December 14, 1994, finding at trial that A.A. is, in fact, religious was based upon proof of (1) what went on in the different kinds of A.A. meetings Warner attended, particularly the Step meetings Warner's probation officer directed him to attend long after the date of sentencing, (2) the manner in which the probation officer intensified Warner's participation in the program when Warner protested, which included having Warner obtain a sponsor and work the Twelve Steps. and (3) the contents of the basic A.A. literature, including *Twelve Steps and Twelve Traditions* and *Alcoholics Anonymous* (the "Big Book"). The proof at the 1994 trial showing that A.A. is religious went far beyond what Warner observed at his first four or five voluntarily attended meetings.

H. Conclusion

The County's self-contradictory arguments also, in effect, ask this Court to sanction a county-wide establishment of religion that could never be remedied except on a case-by-case basis by probationers who have the courage, strength of conviction and financial resources to make individual motions to their sentencing courts. What makes matters worse is that so long as a probation department immediately offers an alternative to A.A. whenever an individual probationer objects to his sentencing judge (like the Probation Department did in Warner's case), and that judge thereby declares the probationer's objection moot (as did Warner's sentencing judge), the government's *systemic* constitutional violation could never be addressed.

It would be analogous to requiring the school children in *Engel v. Vitale* to suffer through daily classroom prayer sessions unless and until they mustered the nerve to ask their teacher for permission to leave the room. Unlike the Free Exercise Clause which affords protection to the *individual*, the Establishment Clause protects the *public*, including probationers.

CONCLUSION

The Petition should be denied.

Dated: September 18, 1999

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Appendix A."Twelve Steps of Alcoholics Anonymous"

We admitted we were powerless over alcohol -- that our lives had become unmanageable.

Came to believe that a power greater than ourselves could restore us to sanity.

Made a decision to turn our will and our lives over to the care of God *as we understood Him.*

Made a searching and fearless moral inventory of ourselves.

Admitted to God, to ourselves and to another human being the exact nature of our wrongs.

Were entirely ready to have God remove all these defects of character.

Humbly asked Him to remove all of our shortcomings.

Made a list of all persons we had harmed, and became willing to make amends to them all.

Made direct amends to such people wherever possible, except when to do so would injure them or others.

Continued to take personal inventory and when we were wrong promptly admitted it.

Sought through prayer and meditation to improve our conscious contact with God, *as we understood Him*, praying only for knowledge of His will for us and the power to carry that out.

> Having had a spiritual awakening as a result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

(emphasis in original)

Appendix B.
Excerpts from "Twelve Steps and Twelve Traditions"

Some of us won't believe in God, others can't, and still others who do believe that God exists have no faith whatever He will perform this miracle [of removing our obsession] . . . Let's look first at the case of the one who says he won't believe -- the belligerent one. He is in a state of mind which can be described only as sa' ıge. (Step Two TSTT 25)

Whether agnostic, atheist, or former believer, we can stand together on . . . Step [Two]. True humility and an open mind can lead us to faith, and every A.A. meeting is an assurance that God will restore us to sanity if we rightly relate ourselves to Him. (Step Two TSTT 33)

Like all the remaining Steps, Step Three calls for affirmative action, for it is only by action that we can cut away the self-will which has always blocked the entry of God -- or, if you like, a Higher Power -- into our lives. Faith, to be sure, is necessary, but faith alone can avail nothing. We can have faith, yet keep God out of our lives. Therefore our problem now becomes just how and by what specific means shall we be able to let Him in? Step Three represents our first attempt to do this. In fact, the effectiveness of the whole A.A. program will rest upon how well and earnestly we have tried to come to a 'decision to turn our will and our lives to the care of God *as we understood Him*. (Step Three TSTT 34-35)

All of the Twelve Steps require sustained and personal exertion to conform to their principles and so, we trust, to God's will. (Step Three TSTT 40)

It is when we try to make our will conform with God's that we begin to use it rightly. To all of us, this was a most wonderful revelation. Our whole trouble had been the misuse of willpower. We had tried to bombard our problems with it instead of attempting to bring it into agreement with God's intention for us. To make this

increasingly possible is the purpose of A.A.'s Twelve Steps, and Step Three opens the door. (Step Three TSTT 40)

Step Five is "the beginning of a true kinship with man and God." (Step Five TSTT 57)

Many an A.A., once agnostic or atheistic, tells us that it was during this stage of Step Five that he first actually felt the presence of God. And even those who had faith already often become conscious of God as they never were before. (Step Five TSTT 62)

This feeling of being at one with God and man, this emerging from isolation through the open and honest sharing of our terrible burden of guilt, brings us to a resting place where we may prepare ourselves for the following Steps toward a full and meaningful sobriety. Step Five TSTT 62)

Of course, the often disputed question of whether God can -- and will, under certain conditions -- remove defects of character will be answered with a prompt affirmative by almost any A.A. member. To him, this proposition will be no theory at all; it will be just about the largest fact in his life. (Step Six TSTT 63)

[I]n a very complete and literal way, all A.A.'s have 'become entirely ready' to have God remove the mania for alcohol from their lives. And God has proceeded to do exactly that. (Step Six TSTT 64)

> If we ask, God will certainly forgive our derelictions. (Step Six TSTT 65)

So Step Six -- 'Were entirely ready to have God remove all these defects of character' -- is A.A.'s way of stating the best possible attitude one can take in order to make a beginning on this lifetime job. (Step Six TSTT 65)

No matter how far we have progressed, desires will always be found which oppose the grace of God. (Step Six TSTT 66)

[T]he difference between 'the boys and the men' is the difference between striving for a self-determined objective and for the perfect objective which is of God. (Step Six TSTT 68)

The moment we say, 'No, never!' our minds close against the grace of God. Delay is dangerous, and rebellion may be fatal. This is the exact point at which we abandon limited objectives, and move toward God's will for us. (Step Six TSTT 69)

For just so long as we were convinced that we could live exclusively by our own individual strength and intelligence, for just that long was a working faith in a Higher Power impossible. This was true even when we believed that God existed. We could actually have earnest religious beliefs which remained barren because we were still trying to play God ourselves. As long as we placed self-reliance first, a genuine reliance upon a Higher Power was out of the question. That basic ingredient of all humility, a desire to seek and do God's will, was missing. (Step Seven TSTT 73)

Refusing to place God first, we had deprived ourselves of His help. But now the words 'Of myself I am nothing, the Father doeth the works' began to carry bright promise and meaning. (Step Seven TSTT 75)

The Seventh Step is where we make the change in our attitude which permits us, with humility as our guide, to move out from ourselves toward others and toward God. (Step Seven TSTT 76)

Whenever our pencil falters, we can fortify and cheer ourselves by remembering what A.A. experience in this Step has meant to others. It is the beginning of the end of isolation from our fellows and from God. (Step Eight TSTT 82)

As an insurance against 'big-shot-ism' we can often check ourselves by remembering that we are today sober only by the grace of

God and that any success we may be having is far more His success than ours. (Step Ten TSTT 92)

Prayer and meditation are our principal means of conscious contact with God. (Step Eleven TSTT 96)

It has been well said that 'almost the only scoffers at prayer are those who never tried it enough. (Step Eleven TSTT 97)

We all need the light of God's reality, the nourishment of His strength, and the atmosphere of His grace. To an amazing extent the facts of A.A. life confirm this ageless truth. (Step Eleven TSTT 98)

Now and then we may be granted a glimpse of that ultimate reality which is God's kingdom. And we will be comforted and assured that our own destiny in that realm will be secure for so long as we try, however falteringly, to find and do the will of our own Creator. (Step Eleven TSTT 98)

The object of meditation "is always the same: to improve our conscious contact with God, with His grace, wisdom, and love." (Step Eleven TSTT 100)

Now what of prayer? Prayer is the raising of the heart and mind to God -- and in this sense it includes meditation. How may we go about it? And how does it fit in with meditation? Prayer, as commonly understood, is a petition to God. Having opened our channel as best we can, we try to ask for those right things of which we and others are in the greatest need. And we think that the whole range of our needs is well defined by that part of Step Eleven which says: '. . . knowledge of His will for us and the power to carry that out.' A request for this fits in any part of our day. (Step Eleven TSTT 102)

. . . when making specific requests, it will be well to add to each one of them this qualification: '. . . if it be Thy will.' We ask simply that

throughout the day God place in us the best understanding of His will that we can have for that day, and that we be given the grace by which we may carry it out. (Step Eleven TSTT 102)

In A.A. we have found that the actual good results of prayer are beyond question. They are matters of knowledge and experience . . . Almost any experienced A.A. will tell how his affairs have taken remarkable and unexpected turns for the better as he tried to improve his conscious contact with God . . . All of us, without exception, pass through times when we can pray only with the greatest exertion of will. Occasionally we go even further than this. We are seized with a rebellion so sickening that we simply won't pray. When these things happen we should not think too ill of ourselves. We should simply resume prayer as soon as we can, doing what we know to be good for us. (Step Eleven TSTT 104- 105)

We know that God lovingly watches over us. We know that when we turn to Him, all will be well with us, here and hereafter. (Step Eleven TSTT 105)

Reviewing the first eleven Steps it is observed that "in Step Three we turned our will and our lives over to the care of God as we understood Him. For the time being, we who were atheist or agnostic discovered that our own group, or A.A. as a whole, would suffice as a higher power. . . [P]racticing these Steps, we had a spiritual awakening about which finally there was no question. Looking at those who were only beginning and still doubted themselves, the rest of us were able to see the change setting in. From great numbers of such experiences, we could predict that the doubter who still claimed that he hadn't got the 'spiritual angle,' and who still considered his well-loved A.A. group the higher power, would presently love God and call Him by name. (Step Twelve TSTT 107-109)

Practically every A.A. member declares that no satisfaction has been deeper and no joy greater than in a Twelfth Step job well done.

To watch the eyes of men and women open with wonder as they move from darkness into light, to see their lives quickly fill with new purpose and meaning, to see whole families reassembled, to see the alcoholic outcast received back into his community in full citizenship, and above all to watch these people awaken to the presence of a loving God in their lives -- these things are the substance of what we receive as we carry A.A.'s message to the next alcoholic. (Step Twelve TSTT 110)

When we developed still more, we discovered the best possible source of emotional stability to be God himself. We found that dependence upon His perfect justice, forgiveness, and love was healthy, and that it would work where nothing else would. (Step Twelve TSTT 116)

Service, gladly rendered, obligations squarely met, troubles well accepted or solved with God's help, the knowledge that at home or in the world outside we are partners in a common effort, the well-understood fact that in God's sight all human beings are important, the proof that love freely given surely brings a full return, the certainty that we are no longer isolated and alone in self-constructed prisons, the surety that we need no longer be square pegs in round holes but can fit and belong in God's scheme of things -- these are the permanent and legitimate satisfactions of right living for which no amount of pomp and circumstance, no heap of material possessions, could possibly be substitutes. True ambition is not what we thought it was. True ambition is the deep desire to live usefully and walk humbly under the grace of God. (Step Twelve TSTT 124-125)

With each passing day of our lives, may every one of us sense more deeply the inner meaning of A.A.'s simple prayer:

> God grant us the serenity to accept the things we cannot change.
> Courage to change the things we can,
> And wisdom to know the difference." (Step Twelve TSTT 125)

Appendix C.
Page 45 from Chapter Four of the "Big Book" entitled "We Agnostics"

. . . If, when you honestly want to, you find you cannot quit entirely, or if when drinking, you have little control over the amount you take, you are probably an alcoholic. If that be the case, you may be suffering from an illness which only a spiritual experience will conquer.

To one who feels he is an atheist or agnostic such an experience seems impossible, but to continue as he is means disaster, especially if he is an alcoholic of the hopeless variety. To be doomed to an alcoholic death or to live on a spiritual basis are not always easy alternatives to face.

But it isn't so difficult. About half our original fellowship were exactly of that type. At first some of us tried to avoid the issue, hoping against hope we were not true alcoholics. But after a while we had to face the fact that we must find a spiritual basis of life -- or else. Perhaps it is going to be that way with you. But cheer up, something like half of us thought we were atheists or agnostics. Our experience shows that you need not be disconcerted.